No. 304

IN THE

Supreme Court of the United States

October Term, 1946

THE BROWN INSTRUMENT COMPANY,
Petitioner,

vs.

SAM B. WARNER, Register of Copyrights,
Respondent.

PETITION OF THE BROWN INSTRUMENT COMPANY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF AND APPENDIX IN SUPPORT THEREOF.

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Of Counsel.

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List of Cases Cited.

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PETITION OF THE BROWN INSTRUMENT COMPANY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Brown Instrument Company, respectfully prays for a writ of certiorari to the Court of Appeals for the District of Columbia to review the judgment of that Court entered on the 2nd day of June, 1946.

A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Petitioner is engaged, *inter alia,* in the mathematical computation of physical phenomena such as temperature, pressure, fluid flow, etc. incident to the efficient operation of factories, power plants, etc.

2. From the mathematical tables computed by petitioner's engineers according to the necessity of the particular customer, and controlled by the particular scientific laws involved in each case, an engineering picture in the form of what is termed a "chart" is created and etched on a plate from which is printed the desired number of copies which are sold by petitioner to the customer (R. 62, *et seq.*).

3. The chart, like any other engineering curve drawn from mathematical data or computations, inevitably teaches and conveys the information of the mathematical computations from which it was drawn; for example, it will show the relation between two or more physical phenomena such as temperature, pressure, fluid flow, differential pressure, etc.

4. Each chart is intended to be used as an element to be operated upon by an ink stylus of a recording instrument. That is to say, the chart is moved at a predetermined rate per unit of time (for example, a circular chart may be rotated once in twenty-four hours), and one or more of the same or *additional* physical factors, or variations thereof, such as temperature, pressure, fluid flow, differential pressure, etc., may be recorded on the chart to teach or convey that *additional* information. In other words, the chart bears somewhat the same relation to the recording instrument that a pre-printed paper bears to a color-printing-press—the paper already has thereon original instructive or informative material to which the color-press adds *additional* data, such as color. Petitioner also makes and sells recording instruments for use with its charts.

5. Section 4 of the copyright statute (17 U. S. C. 4) provides:

> "The works for which copyright may be secured under this title shall include all the writings of an author".

Section 5 of the Statute gives the classification of the "works" of an author which may be copyrighted. Sub-Section (i) classifies as copyrightable "Drawings * * * of a scientific or technical character". Under the Rules and Regulations for the Registration of Claims to Copyright (17 U. S. C. 53: 14 Code of Fed. Regulations, Ch. II, as amended, Sec. 201.4 (9))* this classification is further described in the following language:

> "*This term includes diagrams* or models *illustrating scientific or technical works,* architects' plans, design for engineering work, relief maps, etc. * * *".

Additionally, Section 201.4(1) of the Rules and Regulations, under the heading "Subject Matter of Copyright"* states:

> "The term 'book' as used in the law includes *tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables* * * *".

6. Since at least as early as 1901**, in apparent recognition of the fact that charts, such as those designed by petitioner, constituted graphic illustrations, similar in subject to and differing only in form from usual engineering graphs, it has been the practice of the Register of Copyrights to issue registrations for such charts; and since 1928 the Register of Copyrights has issued to petitioner more than 1200 registrations for charts of petitioner's creation.

7. In the latter part of December, 1943 the Register of Copyrights for the first time refused to issue copyrights to petitioner for new charts which petitioner mathematically

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* Reproduced in full in the appendix hereto.
** See Plaintiff's Exhibit 1.

computed and designed, and for which it made formal and appropriate application for registration, assertedly because of a decision by the United States Circuit Court of Appeals for the Seventh Circuit in *Taylor Instrument Co.* v. *Fawley-Brost*, 139 F. (2d) 98, in which case was involved the issues of alleged trade-mark infringement, unfair competition and copyright infringement. Finding no trade-mark infringement or unfair competition in that case, that Court, on the meagre evidence before it, and because of the absence of evidence to show that the Taylor charts there involved taught or conveyed useful information, incidentally held the Taylor copyright to be invalid. Petitioner was not a party to that case, nor were any of its charts or copyrights there involved. The evidence adduced by petitioner in the present case, as expressly found by the Courts below, specifically includes affirmative and undisputed evidence, the absence of which in the *Taylor* case formed the asserted basis for the decision of the Seventh Circuit Court of Appeals.

8. Because of the refusal of the Register to issue certificates of copyright to petitioner for the new charts it had mathematically computed, designed and printed, petitioner instituted the present suit in the District Court for the District of Columbia, seeking a declaratory judgment of copyrightability of the matter printed on its charts, and a mandatory injunction requiring the issuance to it of certificates of copyright therefor.*

9. Despite the fact that the District Court expressly found (*i. e.*, findings Nos. 6 and 8, R. 43, 44), "the charts

* It is not disputed that petitioner's applications complied with all formal requirements, and were accompanied, in each instance, by the statutory fee.

in suit were based upon mathematical or scientific calculations * * *", and that "it is perhaps possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which the charts are based * * *", the Courts below denied petitioner relief because they were of the opinion that the "real" or ultimate use of the chart was to have recorded thereon *additional* engineering data, and therefore the charts were not copyrightable even though they contained copyrightable data thereon prior to such *ultimate* use. In other words, the Courts below, *for the first time* in the administration of the Copyright Law so far as has been discovered, ignored the statutory prerequisites to copyrightability and created *ultimate use* as the determinative factor thereof. Specifically, the Court of Appeals held that *"Articles intended for practical use in cooperation with a machine are not copyrightable"*.

10. This extraordinary rule of law announced by the Court of Appeals, and upon which it based its decision in the present case, is so drastic and revolutionary, and at the same time is so manifestly erroneous, that the present petition for review by this Court is filed. The erroneousness of the rule of law will be apparent immediately upon consideration of many examples well known to everyone, but two of which need be mentioned. Motion picture films obviously have no practical use whatever except in cooperation with a machine—the motion picture projector. Similarly, stereoptican pictures have no practical use except in cooperation with the stereoptican viewer. Nevertheless, notoriously, motion picture films and stereoptican pictures are copyrightable.

Additionally, the copyright statute is entirely without words or implication as to any such limitation on copyrightability as the Court of Appeals here has created.

Further, an examination of the decision of this Court cited by the Court of Appeals as authority for its novel rule of law, viz.: *White-Smith Music Pub. Co.* v. *Appollo Co.*, 209 U. S. 1, shows that neither by language nor implication does it justify or sanction the rule created in this case by the Court of Appeals below.

11. This Court has never passed upon this question, and the new rule of law created by the Court of Appeals in this case should not be allowed to stand unless and until this Court has done so, especially where, as here, the decision of the Court of Appeals casts doubt upon the validity of more than 1200 copyright registrations which in the past have been issued to petitioner, as well as upon many additional thousands thereof that unquestionably have been issued to other computers and designers of charts or to "authors" for copyrightable material on articles intended for practical use in cooperation with a machine.

The Questions Presented.

The questions presented for review by this Court if the present petition is granted, are:

1. Is an engineering chart which graphically represents mathematical computations, and which, therefore, concededly teaches and conveys the scientific information comprised by such computations, deprived of copyrightability because ultimately it is intended to have *additional* scientific information recorded thereon?

2. Are articles, containing thereon copyrightable material, deprived of the benefits of the Copyright Statute because they are intended for practical use in cooperation with a machine?

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the District of Columbia has decided an important question of copyright law in a manner which is wholly inconsistent with the Copyright Statute, and is unsupported by any decision of this Court.

2. Because the Court of Appeals for the District of Columbia has created new copyright law of far reaching, revolutionary and drastic effect, thereby casting doubt on the validity of thousands of copyright registrations which heretofore have been issued and still are in effect.

WHEREFORE, your petitioner respectfully requests that a writ of certiorari issue out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record of all proceedings in the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals

be reversed, and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 68 U. S. P. Q. 41, and also will be found at page 42 of the record.

The opinion of the Court of Appeals for the District of Columbia is reported in 161 F. (2d) at page 910, and also will be found at page 172 of the record.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is June 2, 1947

2. The judgment was rendered in a Civil Action brought to determine the copyrightability of material under the copyright statute (17 U. S. C. A.).

3. The statute under which jurisdiction is invoked is Section 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

Baker v. *Selden*, 101 U. S. 99;
White-Smith Music Pub. Co. v. *Appollo Co.*, 209 U. S. 1.

Specification of Errors.

The errors which petitioner will urge, if the petition for writ of certiorari is granted, are that the Court of Appeals for the District of Columbia erred:

1. In holding that articles intended for practical use in cooperation with a machine are not copyrightable.

2. In failing to require the Register of Copyrights to issue to petitioner certificates of registration for petitioner's charts which, concededly, graphically illustrate tables of mathematical computations which teach and convey useful engineering information.

Summary of Argument.

The points of argument follow the reasons relied upon for a grant of writ of certiorari and are stated on page 7 of the petition, as well as in the index hereto; for the sake of brevity they are omitted at this point.

POINT I.

The Court of Appeals for the District of Columbia has decided an important question of copyright law in a manner which is inconsistent with the copyright statute, and which is unsupported by any decision of this Court.

As has been stated in the petition, and as affirmatively established by undisputed exidence (R. 62, *et seq.*), petitioner's charts are drawn from mathematical tables which, in every individual instance, are computed, according to the customer's requirements, from established scientific laws. It is believed to be obvious, therefore, that each chart, like an ordinary engineer's curve, inevitably teaches and conveys the same information that the computed mathematical tables teach and convey. In view of the fact that it is so well and long established as law that tables of figures showing the result of mathematical computation (as well as engineering curves plotted therefrom) are copyrightable, it would seem to be inevitable that each of petitioner's charts similarly is copyrightable.

It is believed to be conclusively evident, therefore, that because it accepted the *findings of fact* of the District Judge that petitioner's charts "were based upon mathematical or scientific calculations" and that it is "possible for one skilled in the art to deduce with more or less accuracy the data upon which the charts are based", the Court of Appeals was wholly without statutory justification in denying copyrightability of petitioner's charts. Indeed, the decision of the Court of Appeals is flatly contrary to the statute and to the Rules adopted for the administration thereof.

Nor do this Court's decisions in *Baker* v. *Selden*, 101 U. S. 99 or *White-Smith Music Pub. Co.* v. *Appollo Co.*, 209 U. S. 1, sanction or support the conclusion of the Court of Appeals. The *Baker* case merely held that the copyright on a book *explaining the art of bookkeeping* did not bar the *practice* of the system using the bank account sheets illustrated in the book. In other words, that case long has been authority for the proposition that an *art*—such as a method, machine or manufacture—was not the subject of a copyright, but that *original written or printed material was*. The Court of Appeals was of the apparent—and quite erroneous—impression that petitioner was seeking to copyright and thereby obtain a monopoly on an art or a method. Nothing could be further from the fact. Petitioner is not seeking to obtain a copyright for a method, machine or manufacture, nor for a piece of paper. Petitioner is seeking to obtain copyright for the *original written or printed matter* on its charts, viz.: the graphic illustration of the computed mathematical tables, *per se* made copyrightable by the statute as recognized by the Rules. Obviously, the grant to petitioner of copyrights for the printed matter on its charts vests in it no monopoly of any kind or nature. Such copyrights to petitioner would merely preclude the

copying of the *printed matter* on petitioner's charts, which matter depicts or graphically illustrates petitioner's tables of mathematical computations. Any other engineer could make his own table of mathematical computations and graphically depict them in the same manner as does petitioner, and if, by chance, the mathematical computations were the same and were depicted in the same way, a chart identical with that of petitioner would be obtained without invasion of or trespass upon any right of petitioner—*there would be no copying;* and copying, *alone,* is excluded by the statute.

The Court of Appeals apparently ignored or overlooked all considerations such as these, which immediately and dispositively show the utter want of relevancy of the *Baker* case.

Nor does the *White-Smith* case, either by language or by inference, support or sanction the extraordinary rule of copyright law announced for the first time by the Court of Appeals in this case. To the contrary, all that was decided in that case was that a perforated piano-roll was not a "copy" of sheet music, and therefore there was no copyright infringement under the law. And even on that issue—the sole issue in the case—Mr. Justice Holmes, in a separate concurring opinion indicated that it was his view, from moral considerations, that the law should be changed to prevent that manner of appropriation. There is not the slightest suggestion in either of the opinions in that case to support the proposition for which the case was cited by the Court of Appeals, namely, that articles intended for practical use in cooperation with a machine are not copyrightable.

The manifest error, as well as the injustice in and want of justification for the decision of the Court of Appeals

fittingly may be illustrated by the simple reminder that petitioner is not seeking a copyright for paper discs or sheets to be used in a machine. Petitioner is seeking merely to obtain copyrights for *the original scientific data printed on the charts.* That scientific data expressly has been made copyrightable by the statute as expressly recognized by the rules and regulations governing its administration. No authority of this Court *contra* has been or could have been cited by the Court of Appeals. It is obvious, therefore, that the Court of Appeals has misinterpreted and misapplied the two decisions by this Court upon which it relied.

POINT II.

The Court of Appeals for the District of Columbia has created a new rule of copyright law of far reaching, revolutionary effect, thereby casting doubt on the validity of thousands of copyright registrations which heretofore have been issued and still are in effect.

Where, as here, the Court of Appeals has created law in obvious conflict with the copyright statute, and without precedent by this Court, the public importance of the case hardly seems to require extended emphasis.

In the first place, the pronouncement by the Court of Appeals that "Articles intended for practical use in connection with a machine are not copyrightable" not only injects something into the statute which is not there, but also is flatly contradicted by § 201.4 (7) of the Rules and Regulations (17 U. S. C. A. 53) which expressly provides that registration may be had to protect artistic drawings (and, obviously, other copyrightable matter) *"notwithstanding they may afterwards be utilized for articles of manufacture."* Additionally, the rule originated by the Court of

Appeals also excludes from copyright many things, such, for example, as motion pictures, stereoptican views, etc. which, notoriously and universally, have been recognized and adjudicated as copyrightable. Furthermore, such pronouncement inevitably has the effect of casting doubt on the validity of thousands of copyrights still in effect which heretofore have been granted under the foregoing statutory and administrative sanctions in many industrial fields.

Never heretofore has "use" been a test of or limitation on copyrightability, and it is obvious why it has not. For example, a copyrighted picture in black and white frequently is included in a magazine form with the "real" or ultimate purpose of adding colors thereto. Thereafter, the magazine form is fed through a color-printing-press. While the ultimate colored picture may be copyrightable *per se*, it is obvious that under the copyright statute the black and white picture likewise could be (and usually is) copyrighted. The black and white picture cannot be deprived of copyrightability merely because it was intended to be used in connection with a machine to have colors added thereto. Similarly, a copyrightable poem could be etched or otherwise impressed upon a machine part which was intended for practical use with a machine. The statute does not deprive the author of the poem of his copyright therefor merely because the piece of metal upon which the poem was impressed is intended to be used as part of a machine.

These considerations are believed to crystallize the fallacy of the decision of the Court of Appeals. That Court was concerned with the "use" of *the piece of paper* constituting the chart, and completely ignored the fact that the case is concerned *only with matter printed on the paper.*

There may be justification for the impression of the lower Court that a paper chart may be considered as part

of the recording machine; but petitioner is not seeking to copyright a paper chart. To the contrary, in each instance, what petitioner seeks to copyright—and what the statute says may be copyrighted—*is the original matter printed on* the paper chart—*the graphic representation of computed mathematical tables.*

With this thought—which completely escaped the Court of Appeals below—clearly in mind, the confusion between the copyright law and the patent law evidenced by the last paragraph of the decision of the Court of Appeals becomes evident. It is too obvious to require argument that it is impossible, by means of a copyright, for one to prolong the monopoly of a patent for a machine. All that a copyright gives is the right to prevent plagiarism—the right to prevent *copying of the printed matter copyrighted.*

It is believed, therefore, that the public importance of the issue here presented necessitates a review of this case by this Court. The rights of many owners of thousands of copyrights, as well as the future administration of the Copyright Office require authoritative clarification by this Court of the situation here presented.

Respectfully submitted,

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APPENDIX.

TITLE 17 U. S. C.

§ 4 All writings of Author included. The works for which copyright may be secured under this title shall include all writings of an author.

§ 5 Classification of works for registration. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs.

* * * * * * *

(i) Drawings or plastic works of a scientific or technical character.

§ 53 Rules for Registration of claims

Section 201.4—Subject matter of copyright.

* * * * * * *

(b) Section 5 of the Act (35 Stat. 1076; 17 U. S. C. A. § 5) names the thirteen classes of works for which copyright may be secured, as follows:

(1) Books. This term includes "composite and cyclopaedic works, directories, gasetteers, and other compilations," and, generally, all printed literary works (except dramatic compositions), whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc.; single poems, and the words of a song when printed and published without music; descriptions of motion pictures or spectacles; catalogues; circulars or folders containing information in the form of reading matter, and literary contributions to periodicals or newspapers.

The term "book" cannot be applied to blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum

books, blank diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness.

For the purpose of clarifying the above paragraph as well as numbered paragraph (7) of this Section:

Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices or other "instruments or tools of any kind" (Code of Federal Regulations of Copyright Office, 201.4(b) (7)) sometimes submitted for copyright registration as "books" are not registrable as such. This is also true with respect to words, figures, symbols, etc., essential to the operation of such devices and instructions concerning their use if physically incorporated in such devices.

PROVIDED, That such instructions if not so incorporated and other material of itself copyrightable appearing on such instrument or tool but not essential to the operation thereof, will be registered in the Copyright Office if published with a copyright notice which does not purport to copyright the instrument or tool as such. (See Section 29 of the Copyright Act).

* * * * * * *

(7) **Works of art and models or designs for work of art.** This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools or any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be

sought by copyright registration. (See also Section 201.4, paragraph (b) (1)).

(9) **Drawings or plastic works of a scientific or technical Character.** This term includes diagrams or models illustrating scientific or technical works, architects plans, designs for engineering work, relief maps, etc.

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